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U.S. Department of Justice

Immigration and Naturalization Service

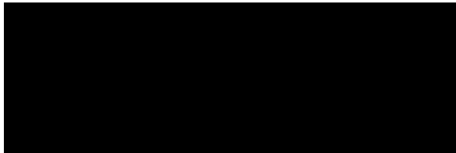
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OFFICE OF ADMINISTRATIVE APPEALS

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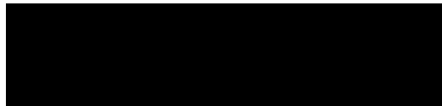


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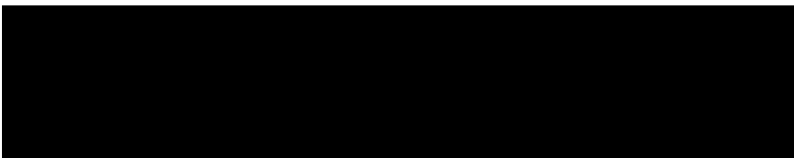
Date: JAN 22 2003

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a construction firm. It seeks to employ the beneficiary permanently in the United States as a painter. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits briefs and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 CFR 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I & N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is August 17, 2000. The beneficiary's salary as stated on the labor certification is \$10.50 per hour or \$21,840 per annum.

Counsel initially submitted insufficient evidence of the

petitioner's business relationship with another corporation, Allglass Systems, Inc. (Allglass), and of the petitioner's ability to pay the proffered wage for a total of six beneficiaries. The director concluded that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage as of the priority date of the petition. On June 19, 2001, the director requested additional evidence to establish the business relationship of the petitioner and Allglass and that the petitioner had the ability to pay the proffered wage or had employed the beneficiary as of August 17, 2000.

In response, counsel submitted a copy of Allglass's 2000 Form 1120S U.S. Income Tax Return for an S Corporation. Counsel further offered a letter of pledge of the assets of Allglass to pay the shortfall in the wages of the potential immigrant(s) as required. The petitioner submitted no federal tax return or audited financial document of its own.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel offers briefs dated February 19, October 22, and October 31, 2002 and additional evidence. They include a copy of the Form 1065 U.S. Return of Partnership Income for the year 2000 for the petitioner, East Coast Fabricators, Limited Liability Company (LLC). Counsel also provided a copy of the 1999 Form 1120S U.S. Income Tax Return for an S Corporation for Allglass. In addition, the petitioner provided three (3) Dun and Bradstreet reports that pertain only to Allglass. The petitioner sent lists of contracts and of payments from Allglass dated from January 2000 to September 2002.

Counsel states of the relationship of Allglass and the petitioner that:

Though shareholder personal assets cannot be considered as evidence of the petitioner's ability to pay, as corporations are separate legal entities, Allglass and [the petitioner] are "affiliated" within the meaning of section 101(a)(15)(L) of the Act where there is a high degree of common ownership and management between the two companies, either directly or through a third entity, Matter of Tessel, Inc., 17 I & N Dec. 631 (Act. Assoc. Comm. 1981). As the relationship between the two companies stems from the fact that Mr. Rein Clabbers is the sole shareholder for both companies, "common ownership and common management, vesting effective control over both companies in their

owner/manager." (Matter of Tessel, supra), the assets of Allglass Systems, Inc. can be considered in the determination of the instant petition.

Counsel's argument is not persuasive. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners or stockholders. Consequently, any assets of the individual stockholders including ownership of shares in other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See Matter of M, 8 I&N Dec. 24 (BIA 1958; AG 1958); Matter of Aphrodite Investments Limited, 17 I&N Dec. 530 (Comm. 1980); and Matter of Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

Counsel argues against the general principle and quotes an unpublished decision:

... As pointed out in a recent AAU decision ... "there is nothing in the Act or the regulations which precludes the petitioner, a wholly-owned subsidiary, from establishing its ability to pay through its parent."
(Copy of case attached)....

Counsel concludes that Allglass is a parent company of the petitioner as a subsidiary, or that they are "affiliated" through Rein Clabbers as the sole shareholder for both. The unpublished decision referenced above carries no weight as a precedent. Only published decisions have such value. See 8 CFR 103.3(c).

Counsel contends,

In the instant case, Rein Clabbers was an owner, officer and majority shareholder of two independent and separate corporations, [petitioner and Allglass]. As an officer of [Allglass], he had the legal authority to pledge the assets of [Allglass] to [the petitioner], so long as the pledge was not illegal, fraudulent or tortious.... (emphasis added).

Counsel and accountants ambiguously characterize Allglass and the petitioner as brother-sister entities, parent and wholly owned subsidiary, and affiliated. From their connection, Allglass's pledge is said to create an asset for the petitioner. Schedule L of the petitioner's 2000 federal tax return, however, reflects no transfer for salaries, either for this beneficiary or for six (6) prospective employees.

In the alternative, counsel relies on Matter of Sonegawa, 12 I & N

Dec. 612 (1967) and contends that:

... What is directly relevant to the future of the company, is the successful business track record of sole shareholder, Rein Clabber[s].... The loss sustained by East Coast in its first year of business for a capital intensive business requiring major machinery and equipment is directly a result of the large investment made into the company by Mr. Clabbers....

Matter of Sonegawa, supra, relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. The petitioning entity in Sonegawa had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in Sonegawa was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in Sonegawa, nor has it been established that fiscal year 2000 was an uncharacteristically unprofitable year for the petitioner.

On appeal, counsel also specifies six items as start-up costs and contends that, properly considered, they demonstrate the petitioner's ability to pay the proffered wage on the priority date of the petition. Although counsel states that the non-recurring start-up expenses and non-cash expenses should not be included in an assessment of the petitioner's ability to pay the proffered wage, these expenditures were already expended, and those funds were not readily available to pay the wage of the beneficiary as of the filing date of the petition. Funds spent elsewhere may not be used as proof of ability to pay the proffered wage.

The petitioner offers lists of contracts and of payments from Allglass dated from January 2000 to September 2002. They carry little weight apart from the expenses associated with them. The petitioner's 2000 Form 1065 showed a loss of -\$335,123. Current liabilities of \$354,382 exceeded current assets of \$130,513, and, therefore, net current assets were a deficit, (-\$223,869). The petitioner has submitted no persuasive documentation that it had the ability to pay the proffered wage at the time of the filing of the petition.

Accordingly, after a review of the federal tax returns, it is concluded that the petitioner failed to establish that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing to present.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.